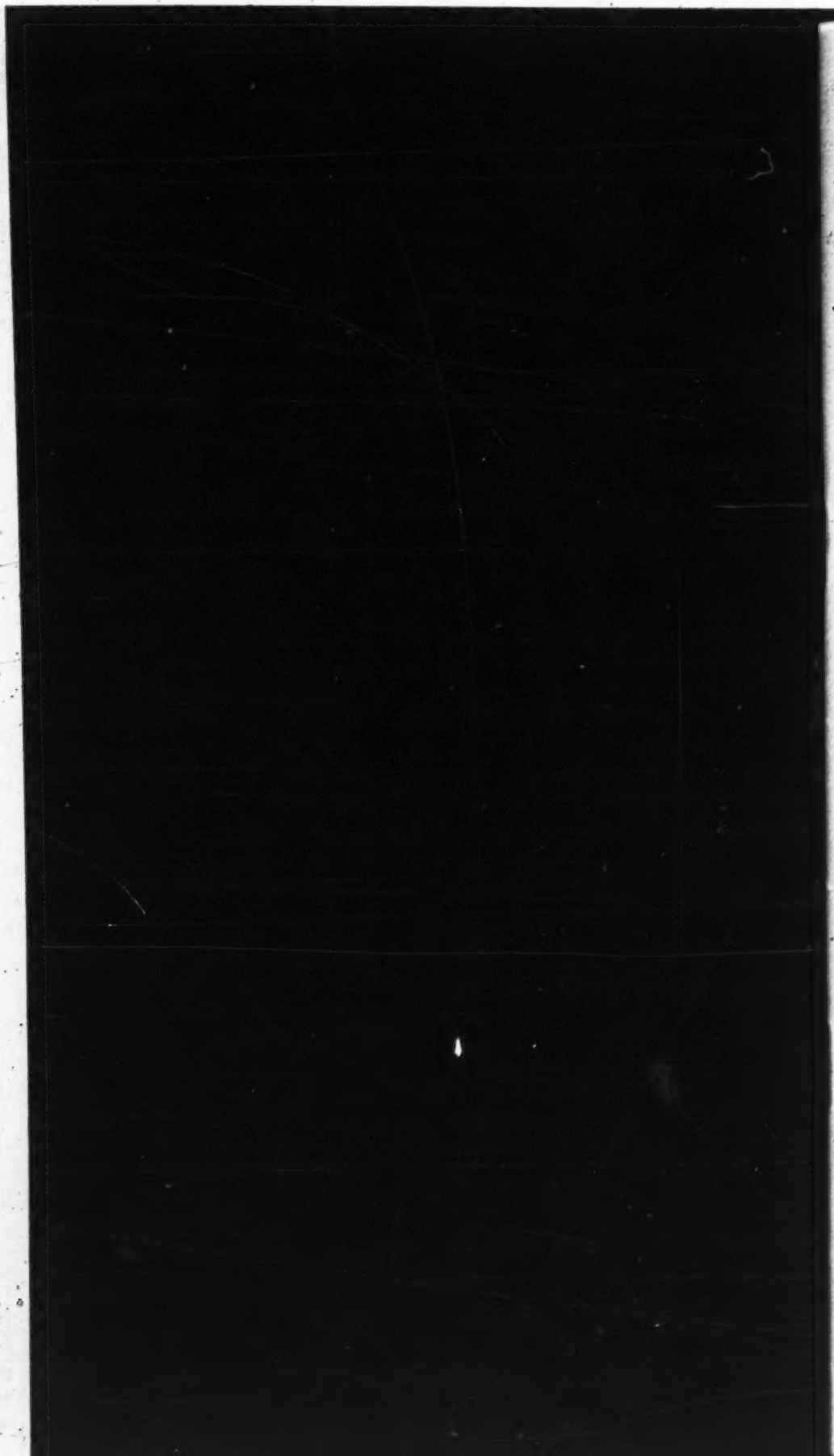

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IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. 6744

LAVERNE CARTER, SUSAN BOWMAN, EVA CARVER, DOROTHY ENOCH, LUCY HALL and BRENDA STEELE et al.,
Appellants (Plaintiffs below),

-vs-

WAYNE STANTON, Director Marion County Department of Public Welfare,
WILLIAM STERRETT, Director Indana State Department of Public Welfare, et al.
Appellees (Defendants below).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

APPELLEE'S MOTION TO AFFIRM

The Appellee moves the Court to affirm the judgment of the United States District Court for the Southern District of Indiana, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument, Rule 16(1)(c), and on the ground that the decision of the District Court is so patently correct as to warrant no further review. Rule 16(1)(d).

QUESTIONS PRESENTED

1. Whether a substantial federal question is raised by a state welfare regulation which defines "continued absence from the home" by a parent as an absence of at least six months' duration.

2. Whether the three judge District Court properly held that Appellants should have pursued administrative remedies before seeking federal jurisdiction of their claims.

STATUTES AND REGULATIONS INVOLVED

The Social Security Act of 1935 § 406(a); 42 U.S.C. 606(a):

> "the term 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . "

The Indiana welfare regulation involved in this appeal, Board of Public Welfare Reg. 2-402(b), being Burns' Ind. Admin. Rules & Regs. Ann. Sec. 52-1001 (2-b).

> "When the continued absence is due to desertion or separation, the absence shall have been continued for a period of at least six (6) months prior to the date of application for assistance to dependent children; except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and reasons for such action."

ARGUMENT

I

APPELLANTS DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

(a). Constitution Considerations: EQUAL PROTECTION

If public assistance has become an unmanageable, ineffective, controversial method of administrating financial aid to needy families, much of the problem emanates from the unclear lines of state and federal responsibility in the field. Welfare is a program with administrative responsibility divided between federal and state and local governments. Administrative problems add to welfare problems, with the States having a substantial and legitimate interest in seeing that local conditions are met.

The crux of this case is whether the establishment of a six month waiting period to determine whether there is a "continued absence" of a spouse is a reasonable answer to the problem of setting up welfare requirements of eligibility, or whether the six month period constitutes an invidious classification in conflict with the equal protection law of the Fourteenth Amendment.

This Court has already demonstrated a sensitivity to the difficulty of administering aid from limited economic resources to an indeterminate class of people. *Dandridge v. Williams,* 397 U.S. 471 (1970). The class of welfare mothers entitled to Aid for Dependent Children has always been difficult to ascertain. Certain abuses such as indiscriminate snooping to find the "substitute father" has been prohibited in the landmark case of *King v. Smith,* 392 U.S. 309 (1967). In *Wyman v. James,* 91 S.Ct. 381

(1971), the court granted the welfare mother the right to have reasonable home visits with notice, but recognized that the right to welfare cannot be unconditional, and therefore upheld the home visit as a prerequisite for welfare eligibility as a rational condition of entitlement. The AFDC program by its inherent imperfections invites abuse and fraudulent claims. The State must have a legitimate interest in limiting fraud, and insuring that every family that goes on AFDC is added to the welfare rolls only after every other means to maintain the family unit has failed. Only after a reasonable period of time can it be predicted with any certainty that every possible means for maintenance has been unsuccessfully employed. The six month waiting period is intended to accomplish just that end. The State has a justifiable concern in seeing that only those properly entitled to welfare be added to the public assistance rolls. Even the six month waiting period is not absolute; it can be bypassed by demonstrating "exceptional circumstances of need" Reg. 2-402(b), or by the welfare mother taking affirmative actions to hold the spouse responsible for the support of his children by either filing for divorce or separation. Thus, there is no distinction or discrimination within the class of women waiting six months for welfare eligibility. And there is always the possibility of gainful legitimate employment occurring.

Furthermore, the local level is the proper place to examine the "exceptional need" criterion which would obtain when the woman cannot wait the six month period and refuses to seek a separation from her husband. Thereby, the children are protected from the intransigent mother.

This court has spelled out with precision the scope of judicial review of a state statute on the subject of welfare

regulation. In *Dandridge v. Williams* at 90 S.Ct. 1161 this Court said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis it does not offend the Constitution."

The whole system of AFDC may be imperfect, but the State has a legitimate ground for scrutinizing each and every welfare application to see that the public interest is not violated and that the limited economic resources are going to deserving applicants.

> "The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman v. James*, 91 S.Ct. at 386.

Unfortunately, welfare is used by some to augment their pocket books. The man of the household disappears to place the family on welfare, and suddenly reappears when the welfare checks start rolling in. This abuse is aggravated by the difficulty of getting fraudulent persons off welfare due to the elaborate, timely, and costly procedure to drop a recepient from the welfare rolls as established in *Goldberg v. Kelly*, 397 U.S. 254 (1970). They would logjam the courts while bankrupting the State. What should be involved is a balancing of the State's interest in seeing that the welfare money goes to the truly needy and the individual's interest that he not be subjected to invidious discrimination or overreaching in violation of his freedoms guaranteed by the Bill of Rights.

The crucial language in the *Dandridge* case exposes the fundamental issue and sets up a prudent test in deciding these difficult problems:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. *But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.* The constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg v. Kelly . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.*" 90 S.Ct. at 1162-1163. (Emphasis added)

In such spirit, the Indiana statutory procedure aims to allocate welfare funds to the truly needy and Indiana officials are doing their best to administer the program. The six month rule, whatever its imperfections, does serve a valid state governmental function. The six month rule does not violate the concept of Equal Protection.

(b). Constitutional Considerations: DUE PROCESS

Appellants argue that because "continued absence" has been defined in Indiana as an absence of six months that they have been denied Due Process of law by a "presumption, which is not supported by any rational connection . . .", p. 9. Yet, can it be realistically said that this rule has no rational basis? The Social Security Act demands that the absence of the parent be a "continued absence." How long is "continued?" This is the question

the state administrators must ask. The loose union which characterizes so many families militates against an easy determination of this factual question. A father who leaves home on a brief soiree is clearly not absent in any "continued" sense. It is common knowledge that some may frequently come and go at odd times, leaving their families for days, weeks, or months. The determination of whether an absence is "continued," in a literal sense, would require impossible surveillance of the home by the welfare department. Thus, it is not unreasonable to set a time period which will serve reliably to establish beyond doubt that the parent is absent in a "continued" sense. As long as the time period has a rational connection to the real problem, it should be upheld, for "the Fourteenth Amendment gives the federal court no power to impose upon the States their views of wise economic or social policy." *Dandridge,* 90 S.Ct. at 1162.

> "We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest . . ." 90 S.Ct. at 1162.

The legitimate interests served here are the avoidance of fraud, conservation of the welfare department's staff man-hours, and the avoidance of the necessity of surveillance. The six month period also discourages the avaricious or scheming father from leaving his family because there will be a reasonable interval between the time he leaves and the family's acceptance for AFDC.

The six month period is rationally connected to the real problem: a father who is gone for six months is unlikely to return; he does not slip in on Sunday nights to apoligize.

The mother can file for separation, or if she wishes, divorce, and legally obtain benefits immediately. As a

result of the decision in *Boddie v. Connecticut,* 91 S.Ct. 780 (1971) court costs cannot be charged in a divorce action to one unable to bear them. In Indiana, courts and legal aid agencies provide counsel to poor mothers in divorce or separation actions. The filing of divorce or separation proceedings prior to the end of the six month period merely serves as evidence that the absence of the father will be "continued," and serves the same function as the actual passage of the six month period.

The six month rule cannot be said to be without rational connection between the fact proved and the ultimate fact presumed. If six months has passed, it can be presumed the absence of the parent is "continued." Only "where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them . . ." will the legislation be incompetent. *U.S. v. Romano,* 382 U.S. 136, 139 (1965). The six month rule can hardly be considered violative of the Due Process rights of Appellants.

(c). Statutory Considerations:

The Social Security Act of 1935, § 406 (a), 42 U.S.C. § 606(a), provides, as does the Indiana regulation 2-400(a) that ". . . 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the, . . . continued absence from the home . . . of a parent . . ."

Indiana has defined "continued absence" as an absence that continues for at least six months. Board of Public Welfare Reg. 2-402(b).

This is a reasonable method of determining whether an absence is a "continued" absence, and is a reasonable

regulation in effectuation of the terms of the Social Security Act. The six month period is a necessary means for the government to determine whether the departed father has in fact continued his absence. Such a rule avoids the problems associated with caseworker "snooping" and concomitant comprises of the recipients' privacy, which was the subject at issue in *Wyman v. James.*

This Court, in *King v. Smith,* 392 U.S. 309, (1968) described the AFDC program as "a scheme of cooperative federalism." 392 U.S. at 316. This Court also said "there is no question that states have considerable latitude in allocating their AFDC resources . . ." 392 U.S. 318-319. Indiana has acted reasonably within this latitude in requiring that an absence be of six months' duration to constitute a "continued absence." This provision does not breach the statutory obligation to furnish "aid to families with dependent children . . . with reasonable promptness to all eligible individuals . . ." 42 U.S.C. § 602 (a)(9) (1964 ed., Supp. II) for the reason that it simply effectuates the determination of which is an "eligible" family with a continued absence of the breadwinner. The duty to furnish aid promptly attaches only when there is an "eligible" family; if there has not been a continued absence, i.e., absence of six months, there is no eligibility requiring the furnishing of aid under this particular program. Indiana's local poor relief program in all townships assures that no needy persons starve or go without clothing or lodging.

For these reasons the Indiana regulation does not conflict with, but rather, implements the Act with a workable standard reasonably related to the prevention of fraud and which eliminates the need for investigation which may intrude into the area of familial privacy.

Moreover, that the Social Security Act does not itself expressly mandate the six month rule is not dispositive.

This Court dealt with another State regulation which was not required by the Act, but which effectuated it, in *Wyman v. James*. "The home visit, it is true, is not required by federal statute or regulation." 91 S.Ct. at 387. In the main, the federal regulations required only periodic redeterminations of eligibility. 91 S.Ct. 387 at or 6. But this Court held the home visitation regulations of New York as proper, despite the lack of express provision for them in the federal Act. Thus Appellant's contention, p. 10, that "the Social Security Act contains no rigid waiting period to establish a 'continued absence'" does not prohibit a necessary waiting period.

II

APPELLANTS SHOULD HAVE PURSUED ADMINISTRATIVE REMEDIES

The three-judge District Court concluded ". . . That none of the plaintiffs appealed the various decisions made at the office level of the County Department. Having so failed to exhaust the administrative appeal procedures provided, we find a failure on the part of the plaintiffs to exhaust their administrative remedies through the state administrative procedures." (Opinion, p. 3).

The rule that administrative procedures should be pursued before going to federal court is an integral part of the constitutional provision that the judicial power of the United States shall extend only to "cases" and "controversies." Article 3, § 2. A case or controversy may be avoided if the claimant achieves a favorable result by pursuing administrative remedies. A case or controversy is legitimately created only at such time as the claimant receives an unfavorable result by pursuing administrative remedies. Thus we have the general rule that administrative procedures for appeal should be followed prior to seeking federal jurisdiction. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951).

In the case of *Monroe v. Pape*, 365 U.S. 167 (1961) this Court held that a plaintiff could sue state officials in federal court under 42 U.S.C. § 1983, alleging unlawful search and seizure, despite availablity of similar remedies under state law. *Monroe* said that 42 U.S.C., § 1983 was available to provide a remedy where state law was inadequate, and to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The *Monroe* holding was expanded in *McNeese*

v. Board of Education, 373 U.S. 668 (1963) to a holding that § 1983 provides a remedy "supplementary" to any a state might have. As Justice Harlan wrote in his dissenting opinion in *Damico v. California*, 389 U.S. 416 (1967), the *McNeese* holding was unwise because, on *facts* disclosing an *inadequate* state remedy, the Court broadly held that even where the remedy was adequate, § 1983 required no exhaustion of state remedies. Justice Harlan wrote that under *Damico* the rule would be that there can be no requirement that a person dealing with an administrative agency continue to deal with it in an orderly fashion, no matter how adequate his remedy there, and that the *Damico* holding was an erroneous extension of the *Monroe* doctrine. Unlike *Monroe* and *McNeese*, there is no intentionally or unintentionally inadequate state remedy here. Indiana state law provides the following review procedures:

> "The county department shall at once report to the state department its decision upon each such application for assistance to a dependent child. *If any such application is not acted upon by the county department within a reasonable time after the filing of the application, or if such application is denied, or if assistance previously granted is modified or revoked, the applicant may appeal to the state department in the manner and form prescribed by the state department. The state department shall, upon receipt of such an appeal, give the applicant an opportunity for a fair hearing thereon.* The state department may also, upon its own motion, review any decision of a county department, and may consider any application upon which a decision has not been made by the county department within a reasonable time. The state department may make such additional investigations as it may deem necessary, and shall make such decision relative to the granting of assistance and the amount of the assistance to be granted as, in its opin-

ion, is justified and in conformity with the provisions of this act [chs. 10-14 of this title]. All decisions of the state department made in conformity with the terms of this act shall be binding upon the county department and shall have the same force and effect as decisions of the county department from which appeals are not taken. [Acts 1936 (Spec. Sess.), ch. 3, § 77, p. 12] (Emphasis Added).

To supplement the administration of such appeal, rules of administrative procedure were promulgated by the Board of Public Welfare as authorized by the legislature in *Burns Ind. Stat. Anno.* § 52-1103. *Burns Indiana Rules and Regulations Annotated,* § 52-1246, specifically provides procedure for an appeal from a county department decision and reads as follows:

"(a) If the county department of public welfare refuses to accept an application for assistance to dependent children; or if an application is not acted upon by the county department of public welfare within a reasonable time or within sixty (60) days after the filing of the application; or if an applicant is dissatisfied with the amount of the award; or if an award previously made is modified; *or if any application is denied or revoked, the applicant or recipient may appeal to the state department of public welfare.* Such appeal shall be in writing over the signature or mark of the applicant or recipient and shall be filed with the county or state department of public welfare. *Every applicant or recipient shall be notified of his right of appeal to the state department of public welfare at the time of his application, and concurrently with each grant, denial or modification of award.*

"(b) Upon notice given by the state department of public welfare, the county department of public welfare *shall review the appellant's situation promptly*

and submit a report of the situation to the state department of public welfare. After due investigation and consideration, the state department of public welfare shall notify the appellant and the county department of public welfare in writing of any action taken and any preliminary finding of fact upon the review of the case and of his right to have scheduled a fair hearing in person before a representative of the state department of public welfare. The state department of public welfare shall inform the appellant and the county department of public welfare of the date and place of any hearing.

"(c) Any such fair hearing shall be held at a place convenient to the appellant and shall be conducted by the administrator, the director of the division of public assistance or by any qualified officer or employee of the state department of public welfare duly designated by the administrator or the director of the division of public assistance to hold and make decisions upon such hearings. The hearing shall be informal and shall provide an opportunity for all persons who have pertinent information to be heard promptly. The appellant may be represented by any person of his own choice.

"(d) Within a reasonable time after the conclusion of a fair hearing, the person who conducted the hearing shall report his findings of fact and decision upon the hearing. Such appeal decisions will be based on the law, rules and regulations of the state department of public welfare, and policies officially adopted by the county board of public welfare, and shall be signed by the administrator or the director of the division of public assistance. A copy of the decision shall be sent to the appellant and to the county department of public welfare. The appellant shall also be notified that the state board of public welfare will review his case personally upon his specific request.

"(e) The decision of the state department of public welfare shall be binding upon the county department

of public welfare, *and shall be put into effect immediately* by the county department of public welfare. Such decision does not preclude the county department of public welfare from modifying the award thereafter, under the provisions of the Welfare Act of 1936 [Burns' Stat. §§ 52-1001—52-1417] as amended, to meet changed conditions.

"(f) The appellant may withdraw his appeal at any point in the procedure by submitting a signed request to the state department of public welfare. [Bd. of Public Welfare, Reg. 2-408, adopted Feb. 21, 1946, filed March 27, 1946, eff. Apr. 6, 1946] (Emphasis Added).

Unlike *Monroe* and *McNeese* the review procedures are adequate to enable the plaintiffs below to present their case by appeal. Had they pursued such an appeal and established exceptional need, as provided for in Reg. 402(b), they could have received payments the same as if the six month eligibility period had not expired, and there would be no practical basis for a case or controversy in the federal court.

To the extent that *Damico* holds that welfare claimants can completely ignore available and adequate administrative remedies before proceeding in federal court under the Civil Rights Act, it should be distinguished for the following reasons.

The Appellants rely upon *Damico,* contending that it is not necessary to exhaust state administrative remedies prior to bringing an action under § 1983. But in *Damico* the action brought was to contest *constitutionality* of a state *statute.* The plaintiff in *Damico* was not required to exhaust administrative remedies because the constitutionality of the state statutes requiring a waiting period could not have been ajdudicated in an administrative hear-

ing. Administrative remedies would have been inadequate to handle the plaintiff's constitutional claim. Here, however, it is an Indiana state *regulation* that is being attacked, and an adequate, reasonable administrative remedy was open to Appellants, which they failed to pursue.

Petitioners assert that "the welfare officials made no investigations to determine whether exceptional circumstances of need and bona fide separation were present." (Jur. Statement, p. 9). Yet it is this failure to investigate and the failure to find exceptional circumstances that would qualify Petitioners for aid that could have been reviewed by administrative appeal, had Petitioners bothered to appeal. Their failure to pursue administrative remedies was properly held below as a bar to their claim being heard in federal court. *Metcalf v. Swank,* 305 F. Supp. 785 (N.D. Ill. 1969).

Appellee Sterrett, in order to avoid undue repetition, hereby adopts and incorporates by reference the argument of Appellee Stanton as to the District Court's lack of jurisdiction.

CONCLUSION

Appellees believe the District Court correctly decided the issues below and pray this Court to affirm the judgment of the District Court.

Respectfully submitted,

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